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FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN MARINOVICH,
Defendant in Error.

No. 1934

IN ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Plaintiff in Error

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STATEMENT.

This was an action brought by the defendant in error (hereinafter called plaintiff) against the plaintiff in error (hereinafter called defendant) to recover damages for injuries received on the 12th day of May, 1910, while in the waiting room of the station house at Mc-

Millin, on a branch line of defendant's railroad, commonly called the "Buckley Branch."

The plaintiff was born in Austria and came to the United States in 1894 and has lived in the State of Washington most of the time since 1896, and for the past eight or nine years has worked as a "coke heaver" at the town of Wilkeson and other mining towns in that locality. In May, 1910, he was working at Fairfax, a short distance from Wilkeson, and left Fairfax and came to Wilkeson, where he worked one day, and on the morning of the 12th left Wilkeson at about "twenty minutes to seven" and went by train to South Prairie. Leaving the train here, he went to Joe Lee's sawmill and inquired for Lee, and, on being informed that Lee was "at the logging camp," he walked to McMillin, passing the railroad stations of Crocker and Orting, walking part of the time on the railway track and part on the wagon road. He arrived at McMillin about noon. He testified on direct examination:

"On the morning of the 12th of May I left Wilkeson and went on the train to South Prairie, and from there I walked down to McMillin so I could see the country, as I was looking for a piece of land. I got to McMillin about noon and went inside the depot there to wait for a train to South Prairie. It was the first time I had ever been there and I did not know about the trains going through there. I wanted to take the first train to South Prairie to see Joe Lee." (Record, p. 21.)

While plaintiff claimed he was looking for land, it was shown that he made no inquiry of anyone about land, his testimony on cross-examination being as follows:

"Q. How long did you stay at South Prairie?

A. About two minutes.

Q. Then where did you go?

A. To Joe Lee's sawmill, and Broomfield, and asked a couple of men loading a car, if Joe Lee at home, and they said 'No,' he was at the logging camp; and I go to Crocker and to Orting and McMillin.

Q. Did you walk all the way?

A. Yes.

Q. On the railroad track?

A. Yes, and on the wagon road, too.

* * * *

Q. About what time did you get to McMillin?

A. Before noon.

Q. What did you go to McMillin for?

A. Looking to buy a piece of land.

Q. Had anybody told you of a piece of land there at McMillin?

A. I came to look out what kind of land to buy.

Q. Did you talk to anybody about land on your way down?

A. No; no, just one man; he said that nobody was at home.

Q. Did you talk to anybody at Orting?

A. No.

Q. Did you talk to anybody at Crocker?

A. I never saw anybody there, only the section man.

Q. Did you talk to anybody at McMillin?

A. Nobody there, only one store.

Q. Did you go to the store?

A. Yes, and bought lunch, too.

Q. Who did you see there?

A. One girl.

Q. That is the girl in the store you bought the lunch from?

A. Yes.

Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. That was all she said?

A. Yes, sir.

Q. She did not tell you when it would come?

A. No; did not say at all what time it come.'' (Record, pp. 22 to 24.)

He also testified that he did not talk with any other person at McMillin; that he took the lunch which he bought at the store and went down to the railroad track, and after eating his lunch went into the waiting room and sat down to wait for a train. He had been there but five or ten minutes when a freight train, in which there were five cars next to the engine loaded with logs, came by, and when the first car was opposite the station a log fell from the car. The forward end of the log struck the ground, and the other end, remaining on the car, pushed the logs off this and the following cars and some of the logs struck the station building, demolishing it and severely injuring the plaintiff, who was in the station.

The station building and the conditions existing at McMillin are set forth in the evidence of Mr. Henry Ball, a merchant at McMillin, who was called by the plaintiff and testified as follows:

"I live at McMillin and am a merchant, having a store at that place. The little station house or waiting room that was knocked down and demolished last May was put in some time last spring; I think in February or March. It was what is commonly known as a blind station. There was a little place on one end for freight and on the other end was a small place, an open shed, with a bench around it for the convenience of people. There are a good many of them throughout the country. I circulated a petition to the railroad company to have them provide this waiting room and I think it was put in in February or March. It was about eight or ten feet from the track and had the name of the station lettered on each end of it.

Cross-examination by Mr. Quick:

"This building was located on the right of way and was about such an affair as you see along the tracks of the street railway. Before it was built the people had no place to get in out of the rain, and for that reason I petitioned the railroad company to construct it. McMillin is a small place with only two stores. People come to the stores and then cross over the track to this building, and before it was put up the women had to stand in the rain, and our idea was to have a place to step in out of the rain when waiting for the train. There was never any agent there and the Hale store had the agency for selling tickets and has had for 22 years to my knowledge. Tickets are sold at the Hale store and the store is always open from about a quarter to 7 in the morning until about half-past 7 in the evening, which is after the evening train. There were two passenger trains each way; one goes down in the morning and is due there about 8, and one goes up at about a

quarter to 10, and then in the evening there is a train comes up, leaving Tacoma about 5, and due at McMillin at 5:36, and another comes down from Buckley, which is due there about half-past 6 or a quarter to 7; I don't remember the exact schedule. There was no passenger train through there after 10 o'clock in the morning until 5:30 in the evening.

Re-direct examination by Mr. Gordon:

"During the twenty-four hours there were four passenger trains, two each way, on this line, and perhaps three local freights and occasionally a through freight; of course, they are not a regular thing. As to the freight trains, I cannot say, as I am not well posted. They sometimes run extras or something of that kind, but there were only four passenger trains, two each way. This logging train was going through at the time of the accident and was not a train scheduled to stop at McMillin. It is not a fact that passengers frequently, with or without a permit, board the freight trains at McMillin, to my knowledge." (Record, pp. 17 to 19.)

The Hale store, where Mrs. Hale acts as agent for the railway company and sells tickets and where the business of the company is transacted, is only about 110 feet from this station building. (Record, p. 14.)

The accident which caused plaintiff's injury occurred about 12:45 p. m., and the train was known as the "logging train" and was not scheduled to stop at McMillin. The five cars of logs had been picked up at the "Crocker Spur," where the logs had been loaded on the cars by the Morris & Brew Logging Company, and the cars were carefully inspected by the train crew before they were placed in the train, and the logs appeared to be loaded in a safe and proper manner. It was also shown that a

log will sometimes work loose and roll from its place on the car as a result of the constant jolting of the train.

The first train on which the plaintiff could take passage for the purpose of returning to South Prairie would not reach McMillin until 5:30 or 5:35 p. m., or about four hours and forty-five minutes after the time of the accident.

For the purpose of proving that the plaintiff had money sufficient to pay his fare on the train, and as a circumstance to be taken into consideration by the court and jury, tending to prove the relation of carrier and passenger, the plaintiff introduced in evidence, over the objection and exception of defendant, Exhibits "D," "E" and "F," which were postoffice receipts for international money orders for the sum of $100.00 each and issued at the United States postoffice at Tacoma, Washington, February 18, 1907, for $100.00 each, which money the plaintiff claimed he sent to his partner in Austria to be given to plaintiff's wife. (Record, p. 29.)

Mr. Ohls, a witness for the defendant, a German by birth and who speaks both the German and Austrian languages, testified that he saw the plaintiff at McMillin, and that "the plaintiff inquired about the camps, logging camps, and also about coal camps and said he was pretty tired. He was talking about Crocker and Bloomfield's; then he wanted to know about the St. Paul camps; they are big logging camps. I did not ask him if he was going out to them and he did not say; only said he was tired. When he left me he went over to Harry Ball's

store. I saw him afterwards, sitting in the waiting room. He was sitting like this (indicating), leaning his head on his hand. That was probably fifteen, twenty or twenty-five minutes before the log train came." (Record, pp. 43-44.)

After plaintiff was injured he was taken on the train to Puyallup, a distance of about three miles, and placed in a hospital. His clothing was examined by a nurse for the purpose of learning his identity, and also what effects he had on him. She testified that "Mr. Bear and I examined his clothing and I went through the pockets to see if we could find his name and what effects he had on him. I found a paper giving his name, some matches, a handkerchief or two, but no money." (Record, p. 42.) The nurse also testified to a certain visit made by J. E. Newton, the defendant's claim agent, who called on the plaintiff for the purpose of obtaining a statement from the plaintiff concerning the happening of the accident, and that the statement of the plaintiff was written down by the claim agent and in her presence carefully read over to the plaintiff and fully explained to him, and that the plaintiff stated that it was his intention to walk back to Orting and take the train at Orting and return to South Prairie. That this written statement, which she also signed as a witness, was identified by her and introduced in evidence. (Record, p. 41.) The manner of taking this statement was fully explained by the claim agent. (Record, pp. 39-40.)

At the close of the evidence, the defendant challenged the sufficiency of the evidence and moved the court to

instruct the jury to return a verdict in its favor for the reason that the evidence was insufficient to entitle the plaintiff to recover, and for the further reason that the evidence affirmatively proved that the plaintiff was not a passenger at the time of his injury. This motion of the defendant was denied by the court and the defendant given an exception to the court's ruling.

ASSIGNMENT OF ERRORS.

I.

The Honorable Circuit Court erred in overruling the motion made by the defendant for a non-suit at the close of plaintiff's case, to which ruling of the court defendant excepted, which exception was allowed by the court.

II.

The Court erred in overruling the motion of the defendant, at the close of all the evidence in the case, to instruct the jury to return a verdict in favor of the defendant for the reason that the plaintiff was not entitled to recover judgment against the defendant under the evidence.

III.

That the Court erred in admitting incompetent and immaterial evidence over the objection of the defendant, which evidence was prejudicial to defendant and was introduced by the plaintiff for the purpose of proving that the plaintiff had the necessary money with which to pay his fare as a passenger on defendant's train, which evi-

dence consisted of receipts for postoffice money orders for money sent by the plaintiff to his wife in Austria many months prior to the time of the accident, as shown by Plaintiff's Exhibits "D," "E" and "F," set forth in the following evidence:

"Q. How do you send money home when you send it?

A. Through the postoffice.

Q. Have you the receipts for any money?

A. Yes.

Q. Where are they?

A. In my pocket.

Q. Here?

A. Yes, sir.

Mr. Quick: I would object to any offer of that as incompetent and immaterial.

The Court: Objection overruled; exception allowed.

Mr. Gordon: I show you Plaintiff's Exhibits 'D,' 'E' and 'F'; did you ever see these before?

A. Yes.

Q. Where did you get them; did you ever have them?

A. I got them at Carbonado.

Q. Did you pay money for these?

A. Sure.

Q. Where were you sending the money represented by them?

A. Home.

Q. To your wife?

A. Yes; to my partner, and he gave to my wife.

Mr. Gordon: We make the offer of these exhibits 'D,' 'E' and 'F' as evidence.

Mr. Quick: Objected to as immaterial.

The Court: Objection overruled; exception allowed.

Whereupon said receipts were received in evidence and marked as Plaintiff's Exhibits 'D,' 'E' and 'F,' respectively."

And in permitting plaintiff to testify over the objection of the defendant concerning receipts for postoffice money orders which had been burned and which were for money sent to the old country many months prior to the date of the accident, as shown by the following evidence:

"Q. Did you lose any papers in a fire, and, if so, when and where?

A. I lost some in a boarding house in California.

Q. How long ago?

A. Last year.

Q. What kind of papers?

Mr. Quick: We object to this.

The Court: Objection overruled; exception allowed.

A. Money order for postoffice papers, for the old country.

Mr. Gordon: I want to show receipts for money forwarded by postoffice orders, of later dates than those already offered, were burned, with his naturalization papers.

Mr. Quick: We object as immaterial and incompetent.

THE COURT: Objection overruled; exception allowed.

A. They were postoffice money orders."

ARGUMENT.

There are but two questions presented by this appeal:

First: Did the Honorable Circuit Court err in overruling the defendant's motion for a directed verdict and in submitting the case to the jury?

Second: Did the Court err in admitting certain evidence set forth in the assignment of errors?

WAS THE PLAINTIFF A PASSENGER?

This action was brought on the theory that the plaintiff was a passenger at the time of his injury. It was tried upon this theory and on this same theory the case was submitted to the jury. The Honorable Circuit Court instructed the jury, among other things, as follows:

"In order to constitute one a passenger, he must go to the place provided by the carrier—in this case the railroad company—for the reception of passengers, and in such a case he is entitled to the use of the station facilities for a reasonable time before the departure of the train on which he intends to take passage. During such reasonable time he is a passenger to all intents and purposes, and entitled to the rights of a passenger. One question, therefore, perhaps the next important question that you have to pass upon, is, was he there within a reasonable time; that is, was the time at which he was there a reasonable time for a *bona fide* intending passenger to be there before the departure of the next train?" * * * "What is a reasonable time is a question in this case of fact for you to determine." * * * "It is for you to say, under all those circumstances, whether

at the time of the occurrence it was a reasonable time for the plaintiff to be there intending to take passage upon the next train. If he was there more than a reasonable time before the departure of the next train, then he would not be entitled to the rights of a passenger and your verdict would be for the defendant." (Record, pp. 52-3.)

While the law in respect to carrier and passenger was correctly stated to the jury, we insist that, as there was no dispute on the question of the length of time the plaintiff was at the station before the departure of a train on which he could take passage, it became a question for the determination of the Honorable Circuit Court whether under the admitted facts the relation of carrier and passenger existed. It was not disputed that the accident to plaintiff occurred at about 12:45 p. m.; that the first train on which he could take passage was not due to arrive at this station until 5:30 or 5:36 p. m. (Record, p. 18); that the railway company maintained no agent or other person at this station house, and that the business of the railway company and the sale of tickets was looked after at the Hale store, and had been for the past 22 years, which store was located about one hundred and ten feet from this little station building, or waiting room.

In the case of *Chicago & E. I. R. Co. vs. Jennings,* 60 N. E. 818, the court in the opinion, at the top of the second column on page 820, said:

"What facts will create the contract relation of carrier and passenger is a question of law, and, when the existence of such relation is in controversy, it is the

duty of the court to give a proper instruction, presented by a party, informing the jury what facts will be sufficient evidence of the contract."

If there had been a controversy; if there had been evidence disputing the time when the plaintiff went into the waiting room, or the time when the next train would arrive, so that the Court could not say as a matter of law that the length of time was too great to create the relation of passenger and carrier, then the submission of the case to the jury under the instructions given would have been proper. But it was the duty of the Court in the first instance to determine the sufficiency of the evidence.

"The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court."

Earnshaw vs. United States, 146 U. S. 60, 13 Sup. Ct. Rep. 14.

THE RELATION OF CARRIER AND PASSENGER IS CONTRACTUAL.

The rule is stated in 6 Cyc. 538, as follows:

"To give rise to the relation of passenger and carrier there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger until there is an acceptance — that is, until within the express or implied knowledge of the carrier or his employes the person seeking to become a passenger has indicated his intention to become a passenger, which intention has been in some way acquiesced in, at least to the extent of not refusing transportation—the relation does not arise, even though the purpose of the person attempting to become a passenger is to pay fare when required."

This rule is stated in *Chicago R. I. & P. Ry. Co. vs. Thurlow,* 178 Fed. 894, on pp. 897-8, as follows:

"It is well settled by repeated decisions that a person must be expressly or impliedly received as a passenger before a carrier becomes under obligation to exercise towards such person that high degree of care and caution for his safety which is due from a carrier to a passenger. The relation between carrier and passenger is contractual, and is created only by a contract express or implied. * * *

"Although it is not alleged in the petition that the deceased was a passenger, yet the case was tried by the plaintiff on theory that he was a passenger, and that at the time of the accident the relation of carrier and passenger had not been terminated. Assuming, for the purpose of the case, that the relation of passenger and carrier did exist by virtue of the contract entered into between the deceased and the defendant for his transportation from Wellington to Calhan, and that the defendant had undertaken, as to him, all the duties and obligations of a carrier of passengers, manifestly that relation terminated upon his arrival with his car at his destination and after a reasonable time had elapsed for him to alight and leave the premises of the defendant." Citing cases.

There is no claim in this case that there was an express contract of carriage, and the sole question for consideration is whether the conceded facts create the contractual relation of carrier and passenger by implication. It is claimed by the plaintiff that, as he had never been to McMillin before and did not know when the next train would arrive on which he could leave, he had the right to stay on the premises of the defendant and in this little waiting room until such time as a train would come along on which he could depart, and that during all that time he would be a passenger, placing upon the

defendant all the duties and obligations imposed by law and growing out of the relation of carrier and passenger. It must be borne in mind that McMillin is and always has been what might be termed a cross-road station. Under the evidence there are only two stores there, and for over 20 years no station building or waiting room of any character; that some two or three months before the accident to the plaintiff the railway company erected this litttle shed at the request of persons signing a petition, which was circulated by the witness Ball, that those waiting for the trains might be sheltered from the rain. For over 20 years the agency for selling tickets and transacting such little business as the company had at that point was at the Hale store, about one hundred and ten feet distant from where this shed was erected. The only inquiry made by plaintiff was made of the girl in Mr. Ball's store, from whom he purchased a lunch, and it is quite evident from plaintiff's testimony that the girl did not understand his question or he did not understand her answer, or that she purposely answered him in a joking and evasive manner.

"Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. Was that all she said?

A. Yes, sir.

Q. Did she tell you when the train would come?

A. No; she did not say at all what time it come?

Q. She just said it would come along some time?

A. Yes." (Record, p. 24.)

That the statements of persons not connected with the railway company are not binding upon the company and do not justify one in acting thereon is clearly stated in the case of *Haase vs. Ore. Ry. & Nav. Co.* (Ore.), 24 Pac. 238, in the following from the opinion at page 240:

"The first question to which our attention will be directed is the appellant's exception to that part of the plaintiff's evidence in relation to what was told him at the Umatilla House, and what the unknown man said to him in relation to the movements of the defendant's trains, etc. The purpose of this evidence is not very apparent; but by it, I think, the plaintiff sought to place before the jury the information upon which he acted in relation to the defendant's trains, and to account for his going to the yard where he was hurt at the late hour of the night when the accident occurred. It is difficult to see how the unauthorized acts or words of a stranger, who is not shown to have any connection with the defendant company, could affect or bind it, and yet it is perfectly obvious from the whole tenor of this evidence that such was its purpose."

It was the duty of the plaintiff to inform himself of the time when he could depart from McMillin on one of defendant's trains.

"It is the duty of a person about to take passage on a railroad train to inform himself when, where and how he can go or stop, according to the regulations of the railroad company."

Atchison, T. & S. F. Co. vs. Gants, 17 Pac. 54.

"Doubtless a railroad company not only has the right, but it is its duty, to operate its trains in accordance with established rules and regulations, and upon these it is

not bound to infringe in order to accommodate a single passenger. On the other hand, it is the duty of one about to become a passenger to use reasonable diligence in acquainting himself with the rules and regulations of the company respecting the time when, the place where and the circumstances under which a train upon which he desires to travel may go or stop, according to the company's rules or regulations; and if by neglecting to do so he makes a mistake, he can have no remedy if he be carried past his destination or ejected before getting there."

Pittsburg, C. & S. St. Co. vs. Lightcap, 34 N. E. 243. (Opinion, p. 244.)

"There can be no pretense that plaintiff was induced to go upon the mixed train, which did not run to his place of destination, by reason of any invitation or representation made by any servant of the company, and we understand it to be the duty of a person, situated as was plaintiff, to inform himself whether or not he could make that continuous passage from Temple to Ballinger contemplated by his ticket, on any particular train, and the jury should have been so instructed."

Gulf C. & S. F. Ry. Co. vs. Henry, 19 S. W. 870. (Opinion, p. 872.)

The plaintiff could have informed himself concerning the train had be gone to Hale's store, or had he made any effort to inform himself, as he should have done, when it must have been evident to him that he did not understand the girl at Ball's store or that she had not fully informed him concerning the train. The plaintiff testified that he could not read or write (Record, p. 34), so time tables, schedule cards or other printed information was of no assistance to him.

The fact that one cannot read or easily understand

our language is no justification in attempting to take up his abode on the premises of another, and this fact, I anticipate, would be most forcibly impressed upon us if traveling in a foreign country where we were unable to read or understand the language and unable to inform ourselves of the time of the departure of some train or stage on which we desired to take passage, and which would not leave for two or three days, if we should go into the public waiting room and roll up in our blankets to await transportation. The fact that plaintiff did not know or even was unable to learn when his train would arrive in no manner changed his status or tended to constitute him a passenger.

The defendant had a right — in fact, it was its duty — to establish schedules for the running of its trains; and this it did when it provided for two passenger trains each way daily on this branch line, one due at McMillin about 8 and the other about 9:45 a. m., and one "leaving Tacoma about 5 and due at McMillin at 5:36, and another comes down from Buckley, which is due there about half-past 6 or quarter to 7" p. m., and provided for the sale of tickets at the Hale store, which was open before the morning train and kept open until after the evening trains. (Record, p. 18.) The defendant had thus performed its full duty, and had a right to use its tracks and property with the understanding and presumption that passengers would be upon its premises for the purpose of taking passage upon its trains only within a reasonable time before the arrival of such trains at its station. At the time the logging train went by this station

it was at least four hours and forty-five minutes before the arrival of a passenger train or any train on which the plaintiff could take passage. The defendant, therefore, had a right to presume that its track was free and clear of intending passengers, or persons, to whom it would owe any duty in that respect, and the fact that the plaintiff was in this little waiting room gave him no greater rights than if he had been injured in the same manner while he was walking along the track between the stations of Orting and McMillin only a few minutes before.

In the case of *Matson vs. Port Townsend Southern R. R. Co.,* 9 Wash. 449, the plaintiff was fishing in a creek near the railroad bridge when a train loaded with logs came by and one of the logs rolled from the train, striking and injuring the plaintiff; and the court in considering the case held that "if the proof showed that the logs were loaded in the manner required by the custom prevailing among those engaged in the transportation of logs on cars propelled by steam power, the presumption of negligence, if any existed, would be overcome," and that as the railway company had no reason to anticipate the presence of the plaintiff on its premises at that time and place, and his presence was not known to any of its agents or employes, it owed him no duty, and that defendant's motion for judgment should be granted.

It was proven in the case at bar that the logs were loaded in the customary way, the cars were inspected by the train crew, the track at the place of the accident was straight and in good condition, and also that logs prop-

erly loaded will sometimes work loose and fall from moving cars. (Record, pp. 45-50.)

We desire to call the attention of the Court especially to the case of *Fremont, E. & M. V. R. Co. vs. Hagblad,* 101 N. W. 1033, as this case is very instructive on the question of when the relation of carrier and passenger begins and the duty which a carrier owes to persons along its tracks or resorting to its station. A great many decisions are cited and reviewed in the opinion; after which the court, beginning on page 1038, says:

"A railroad company is not bound to furnish a place of entertainment for persons who may intend at some future time to become passengers over its road; and such a person who resorts to its station, or who stands upon its platform exposing himself to such dangers and risks as may naturally and obviously occur at such a place by reason of rapidly moving trains, switching of freight cars or engines passing by, or by the moving of articles of freight, assumes and takes upon himself the risk of injury, and is entitled to the carrier's protection in no greater degree than any other licensee. Ordinary care under all the circumstances of the time and place is all he is entitled to. The fact that he may have procured a ticket is immaterial.

The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier's charge. If, within a reasonable time before the departure of the train he intends to take, he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier's care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest de-

gree of care for his safety. To hold otherwise would be to place a most unjust and onerous burden upon the carrier. In this day and age of 'limited trains,' 'lightning expresses,' 'flyers,' 'cannon balls,' as they are sometimes fancifully designated, many stations and platforms upon main lines of railroad are passed by such trains at rates of speed as high as 60 miles an hour. If a railroad company were held to the same high degree of care to persons who are not passengers over its road, resorting to its stations to loaf or loiter, it would be compelled to moderate the rate of speed of such trains at every way station along its line, and otherwise would be compelled to interfere with the operation of its trains, and the proper conduct of its business, to preserve the safety and welfare of persons to whom it owed no duty. Such a rule would be intolerable, and has not been enacted by the section under consideration. In order to state a cause of action upon the statutory duty of a railroad company to a passenger, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law, and is not sufficient. This rule has been well stated in the case of *Harris v. Stevens,* 31 Vt. 79, 73 Am. Dec. 337, where the plaintiff sued in trespass for removal from a railroad station house, and in his replication attempted to establish his right to be and remain at the station. The court sustained a demurrer to the replication, and entered judgment for the defendant. In the syllabus the court says: 'The right to enter and remain at a railroad station house extends only as far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and, as to what is a reasonable time, will depend upon the circumstances of each particular case.' And in the opinion it is said: 'It is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged, his ticket may have been for, and his

intent to go upon, one of those trains called "excursion trains," that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect we think the replication is defective. The plaintiff should have alleged that at the time he was at the station awaiting the departure of a train that was expected soon to leave and on which he intended to go. The replication should show that the plaintiff was there intending to go upon a train that was expected to leave within such a short period of time thereafter that, in view of the rule as before laid down, he would have the right to remain at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient.' So far, then, from having brought himself within the class of 'a passenger being transported,' as the statute prescribes, plaintiff in this case has not even pleaded facts sufficient to show that he was a passenger under the non-statute law prescribing the qualifications of the class of persons embraced under that general designation."

As well stated, if a railway company were held to its responsibilities as a carrier to persons who resort to its stations at other than a reasonable time prior to the expected departure of a train on which they could take passage, "*it would be compelled to moderate the rate of speed of such trains at every way station along its line.*" It would be impossible to operate *limited trains* and such obligations would greatly hamper carriers in the conduct of their business and impose unreasonable restrictions.

The fact that logs sometimes work loose and fall from moving cars certainly emphasizes the reason for the rule that carriers are not required to anticipate the presence

of passengers, *especially at way stations,* hours in advance of the arrival of scheduled passenger trains.

In the case of *Illinois Cent. R. Co. vs. Laloge,* 69 S. W. 795, the plaintiff arrived at Central City, Kentucky, on the morning of February 16, 1900, and her husband arrived later in the day. They did not stop at any hotel or other place, but loitered about the depot and other points in the town during the day. About 8 o'clock in the evening they went to the depot for the purpose of waiting for the train upon which they were to take passage, which train was not due until about 1:05 a. m. After learning the time their train would arrive, they went out in the town and returned again about 10 o'clock to the depot, when the plaintiff was assaulted. The court in the opinion said, at page 796:

"The carrier is not an innkeeper. It cannot, in the discharge of its other duties required by the law, be held to furnish accommodation for the entertainment, for an indefinite length of time, of those who contemplate in the future becoming its passengers. It would have been just as reasonable to have held appellant liable for the safety and comfort of appellee at any time while at its depot, from 9 o'clock in the morning of the 16th to 12:30 in the morning of the 17th, as for the time sued for."

It will be observed that the court here holds that three hours is an unreasonable length of time for an intending passenger to go to the station before the arrival of his train. True it is that in the State of Kentucky there is a statute requiring railway companies to keep their ticket offices open for the sale of tickets at least thirty minutes immediately preceding the scheduled time

of the departure of all passenger trains, and shall open the waiting room for passengers at the same time as the ticket office and keep it open and comfortably warmed in cold weather until the train departs, and that the court in this case refers to this statute as a legislative expression of what is a reasonable time. But even in the absence of such a statute we are free to assert that no court of last resort has ever held that four hours and forty-five minutes is a reasonable time for an intending passenger to go upon the premises of the carrier and thereby create by implication the relation of carrier and passenger.

In *Andrews vs. Yazoo & M. V. R. Co.,* 38 So. 773, the Supreme Court of Mississippi held that "where plaintiff, who intended to take a train not due for an hour or so, and who had purchased no ticket, obtained permission from the station agent to do some writing in the office of the station, and while there he and the agent became involved in an altercation over a private matter, in which the agent committed an assault on plaintiff, the railroad company was not liable, the relation of passenger and carrier not existing, and Code 1892, Sec. 4313, requiring railroad companies to furnish suitable reception rooms, and to protect passengers from offensive conduct, having no application."

In the case of *Archer vs. Union Pacific R. Co.,* 85 S. W. 934, the Supreme Court of Missouri held that the relation of passenger did not exist where the plaintiff was a member of an excursion party which had gone from Kansas City, Missouri, to Topeka, Kansas, to attend a meeting of a secret order and had arranged with the carrier to place their car on a side track near the station in order that the members of the party could re-

turn to the car at any time during the night they desired and remain in the car until its departure the following morning, and that the plaintiff was injured while going to the car between 4 and 5 o'clock in the morning, and some three hours before the car was to be picked up for the return trip.

"The duty of a railroad to have its station platforms guarded and lighted so as to protect persons coming to the station to bid farewell to friends intending to leave on regular passenger trains does not extend to persons coming at an unusual hour with one who intends leaving on a freight in charge of stock, and who, although allowed the use of the waiting room, and allowed to load at the platform instead of in the yards, is not a passenger except in a very limited sense."

Dowd vs. Chicago, M. & St. P. Ry. Co., 54 N. W. 24.

In the case of *Chicago, K. & W. R. Co. v. Frazer*, 40 Pac. 923, a case where the plaintiff had neglected to leave the train within a reasonable time after it arrived at the station and he was injured by a construction train colliding with the car, the Supreme Court of Kansas said, at page 924:

"When he had been safely carried to his destination, and to a point which was then the end of the road, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such."

"Plaintiff entered a railroad station, intending to take the last train, but, finding it had gone, waited there for a horse car. While he waited, the depot master put out some of the lights, preparatory to closing up, and plaintiff, on leaving, was injured through the darkness

on the steps. *Held,* that he was not a passenger, and the railroad company was not liable."

Heinlein vs. Boston & P. R. Co., 16 N. E. 698.

The authorities are unanimous in holding that the relation of carrier and passenger is not created by implication where the person intending to become a passenger goes to the station an unreasonable length of time before the scheduled time for the departure of his train. And while what constitutes a reasonable time must depend upon the facts of each particular case, no court, so far as we have been able to find, has held four hours and forty-five minutes to be a reasonable time under any circumstances. The waiting room at a station is for the accommodation of passengers, and not a loafing place. The distance the plaintiff walked from South Prairie to McMillin was 11 miles. It is three miles from Orting to McMillin and eight miles from Orting to South Prairie." (Record, p. 47.) The witness Ohls testified: "I saw him (plaintiff) afterwards sitting in the waiting room; he was sitting like this (indicating), leaning his head on his hand," and that just before that the plaintiff in talking with this witness had said that he was tired. (Record, p. 44.) This evidence is corroborated by the conduct of the plaintiff in that when the freight train approached the station he did not leave the seat where he was sitting to go out and stop the train, or to see if it was one on which he could take passage. He was evidently tired from his long walk and had gone into this waiting room simply to rest, and for that reason paid no attention to the train.

Under these circumstances the Court should have held, as a matter of law, that the plaintiff was not a passenger; and it was error to submit this question to the jury when the evidence showing the length of time the plaintiff was in the waiting room before the time for the arrival of a train on which he could take passage was not disputed, and that such time was at least four hours and forty-five minutes.

THE COURT ERRED IN ADMITTING INCOMPETENT AND IMMATERIAL EVIDENCE.

If it should be held that this case was properly submitted to the jury, it then becomes necessary to consider the alleged error committed by the Court in admitting certain evidence set forth on pages 58, 59 and 60 of the record.

In order to sustain the claim of the plaintiff that he was a passenger, it became necessary to prove that he possessed the means of procuring transportation; and, as it was admitted that he had not purchased a ticket, it became necessary to prove that he was provided with money sufficient to procure transportation. It was shown that when he was taken to the hopsital at Puyallup, immediately after the injury, a nurse in the hospital examined his clothing and "went through the pockets to see if we could find his name and what effects he had on him." That she found "some matches, a handkerchief or two, but no money." (Record, p. 42.) As tending to show that the plaintiff had money with which to secure transportation, he was permitted, over

the objection and exception of the defendant, to identify Exhibits "D," "E" and "F," which exhibits were admitted in evidence over the objection and exception of counsel for defendant. These exhibits introduced in evidence and placed before the jury are receipts for international money orders issued at the United States postoffice at Tacoma, Washington, February 18, 1907, and are for the sum of $100.00 each, and this money plaintiff testified he sent to his partner in the old country to be given to his wife. (Record, p. 29.) The plaintiff was afterward recalled to the witness stand and over the objection of the defendant permitted to testify that he had lost other postoffice money order receipts, which had been destroyed by fire in a boarding house in California. (Record, p. 34.) It will be observed that the plaintiff had already testified that he had not sent any money to his wife during the last year.

"Q. How much money did you send back home, if any, in the last year?

MR. QUICK: That is objected to as immaterial.

THE COURT: Objection overruled; exception allowed.
Q. How much?

A. No send any last year.

Q. What did you do with your money last year?

A. Spent it for myself; no work last year much; I was laid off; they shut down fifty or sixty ovens there." (Record, pp. 27-8.)

How it can be claimed that the fact that the plaintiff sent money to his wife in Austria in February, 1907, more than three years prior to the date of his injury,

tended to prove that the plaintiff had the necessary money with which to purchase transportation on May 12, 1910, is something we cannot comprehend; and yet it is just such evidence as this that many juries will seize upon as an excuse for returning a verdict against a corporation.

This evidence did not tend to prove any issue in the case. It did not prove that the plaintiff had money at the time he was injured. It did not disprove the statement of Miss LaPlante, the nurse, that there was no money in the pockets of his clothes when she examined them at the hospital. The fact that he had $300.00 in February, 1907, did not tend to prove that he had a like sum, or any money at all, when he walked from South Prairie to McMillin and went into the little waiting room to sit down and rest. The only effect of such evidence was to poison the mind of the jury against the inference that the plaintiff was not intending to take passage upon the train at that point, which inference was properly deducible from the evidence that he had walked from South Prairie to McMillin; that he claimed to Mr. Ohls that he was looking for work, but refused work when offered employment as a farm hand (Record, p. 44); that he told the claim agent of the defendant, and the nurse, that he was going to walk back to Orting, and that when the freight train came he made no effort to see if it was a train on which he could take passage as a passenger; that during the preceding year fifty or sixty ovens had been shut down and there was not much work,

and he had spent all his money on himself, as he testified.

For the errors above set forth and presented in this brief, we insist that the judgment in favor of the plaintiff should be reversed, with direction to the Honorable Circuit Court to enter judgment in favor of the plaintiff in error.

Respectfully submitted,

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